IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 972

THE TIMES-MIRROR COMPANY, a corporation, and L. D. HOTCHKISS,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,

Memorandum of American Civil Liberties Union, Southern California Branch, as Amicus Curiae, in Support of Petition for Certiorari.

A. L. WIRIN,
501 Douglas Building, Los Angeles,
Attorney for American Civil Liberties Union, Southern California Branch, Amicus Curiae.

LEO GALLAGHER,
GROVER JOHNSON,
Of Counsel.

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Preliminary Statement.

The Southern California Branch of the American Civil Liberties Union, with leave of the California courts below, appears as amicus curiae, both in the Superior Court of Los Angeles County and in the Supreme Court of California. We urged upon the California courts the rejection of the "tendency" doctrine—commonly designated as the "dangerous tendency" or "inherent tendency" rule. We advocated the adoption of either the "actual obstruction" principle, or the "clear and present danger" rule, to alleged

contempts by publication. Both these tests were rejected by the Supreme Court of California.[1]

The petitioner herein apparently contents itself with reliance upon the latter rule alone; this memorandum will be directed, accordingly, to a discussion of the "actual obstruction" test.

The Interest of the American Civil Liberties Union, Southern California Branch.

The Southern California Branch of the American Civil Liberties Union is an organization of citizens in California who are concerned with the preservation and extension to all, of constitutional liberties as guaranteed by the Bill of Rights in the Constitution of the United States. The political philosophy of most of its members is commonly designated as "liberal."

The "Los Angeles Times" is an old, wealthy and powerful daily newspaper. Its political philosophy is "conservative."

For over half a century the "Times" has been a vigorous and active mouthpiece of the anti-labor and open-shop employer interests of Southern California. For fifty years it has had much to say in its editorial columns upon many public issues. Not once, however, has it ever raised its voice in defense of freedom of speech for anyone other

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[1]Opinion of the Supreme Court of Calif., *Times-Mirror Publishing Co. v. Superior Court*, 99 Cal. Dec. 108.

than for itself and for those in its, and its publisher's economic class. When Yetta Stromberg,[2] California radical; Angelo Herndon,[3] young Communist; Amy Lovell,[4] religious fanatic, and Kim Young,[5] Los Angeles student, asserted that they had been deprived of freedom of speech, the "Times" maintained a studied silence. Now that its own freedom is affected it protests stoutly that its freedom of speech has been abridged by its conviction for contempt of court. The American Civil Liberties Union joins in the protest, however. The Civil Liberties Union wants it clearly understood however that its appearance is as a "friend of the *Court*," and *not* as a friend of the *"Times."*

The explanation for this appearance by the Union is because we believe with Mr. Justice Holmes that "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought that we hate. . . ."[6]

Because we try to practice what we preach, this memorandum is submitted, with leave of court, in *support* of the petition for certiorari.

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[2]*Stromberg v. Calif.*, 283 U. S. 359.

[3]*Herndon v. Lowry*, 301 U. S. 242.

[4]*Lovell v. Griffin*, 303 U. S. 444.

[5]*Schneider v. State*, and *Young v. Calif.*, 84 L. Ed. Adv. Op. 115. and more often quoted version of this point of view is attributed to Voltaire, and is to the effect: "I hate what you say, but I will defend with my life your right to say it."

[6]*United States v. Schwimmer*, 279 U. S. 644. The more familiar

Argument.

The "Actual Obstruction" Principle Is the Correct Test to Be Applied to Alleged Contempts of Court by Publication.

It was Justice Holmes who, with Justice Brandeis, fathered the "actual obstruction" principle as applied to contempt by publication.

Dissenting (with Justice Brandeis) in *Toledo Newspaper Co. v. United States*, 247 U. S. 402, he asserted that an *actual* obstruction of justice was necessary in order to support a conviction for contempt of court based upon discussion of a pending case.

Justice Holmes could not find any evidence in the case that there was "anything that obstructed the administration of justice in any sense" that he could possibly give to those words.

Because in his opinion "there was no emergency" and "there was nothing to warrant a finding that the administration of justice was obstructed" he joined with Justice Brandeis in urging the reversal of the conviction.

Two liberal state courts have adopted the Holmes-Brandeis view. Thus, the Supreme Court of South Dakota, in *State v. American News Company*, 64 S. D. 385, rules: "that any publication, to be punishable as contempt, should be embarrassing or obstructive to the administration of justice in a pending case, and *obstructive in fact rather than in theory or by possibility.*" (Italics ours.)

We quote further from the opinion:

> ". . . We believe that in all contempt cases the distinction should be borne in mind throughout be-

tween a merely defamatory publication and an *actually obstructive publication.* We think the courts should reserve the use of the weapon of contempt for such publications as can fairly and reasonably be said in point of *actual fact* to intimidate, influence, impede, embarrass, or obstruct the court in the due administration of justice in an actually pending matter. And we entertain the opinion that if error is made in either direction in determining that question, it is better and wiser to err in favor of absolute and unrestricted freedom of speech rather than in the other direction. . . . (Italics ours.)

Similarly, the Supreme Court of Indiana is in accord with the requirement that an actual interference with the Court is necessary to support a conviction for contempt of Court by publication.

That Court decided in *Nixon v. State*, 193 N. E. 591:

"The right to fully comment and criticize the action, opinions, and judgments of courts is of primary importance to the public generally. It is not only good for the public, but has a salutary effect upon the courts and judges as well. Courts and judges are not and should not be above criticism, and as long as they are not impeded in the conduct of judicial business by publications having the direct tendency and *effect* of obstructing enforcement of their orders and judgments, or of impairing the justice and impartiality of verdict, there is no right to enforce a contempt proceeding.

"We do not think it is the policy of the law to unduly extend the doctrine of contempt proceedings as applied to publications claimed to impede, interfere with, or embarrass the administration of justice. It must clearly appear that such publications *do* impede,

> interfere with, or embarrass the administration of justice before the author of the publication should be held for contempt." (Italics ours.)

This actual obstruction test was in effect adopted by Justice Gibson dissenting below. He urged the reversal of the petitioners' conviction for contempt on the ground that

> "no evidence of actual interference with any legal proceeding was produced. . . . No judge seems to have felt the pressure of improper influences. No disturbance of judicial calm occurred until after the accusations were filed.
>
> "All this is indicative of the lengths to which imagination may go in building groundless fears and in imputing potent and obstructive purposes foreign to the intent of the writer. I think that by our decision in this and the Bridges case we have sacrificed a substantial part of our cherished freedom of speech and press in order to stamp out an evil that does not exist."

The advantage of the actual obstruction test lies in its simplicity, clarity and ease of enforcement. Here we have no standard so vague and indefinite as to constitute a "dragnet" to enmesh any newspaper publication which a judge may later deem ill advised. No one questions the authority and duty of a court to take appropriate steps to penalize actual interferences with the administration of justice; no newspaper publisher, nor the staunchest champion of freedom of the press, justifies *actual* obstruction of justice: *actual* interference with the judiciary through publication clearly constitutes an *abuse* of free-

dom of the press.[7] The rule clearly safeguards freedom of the press; at the same time it adequately protects the judiciary and the administration of justice from all actual encroachments, interferences and dangers.

To paraphrase Jefferson,[8] the rationale of this test is that "it is time enough" for the judges to step in when the expression of opinions concerning pending causes "break out" into actual interference with the courts. The rule reconciles the authority of the judiciary with the freedom of the press.

Because the California courts rejected the actual obstruction principle as applied to the alleged contempt by the petitioners, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

A. L. WIRIN

Attorney for American Civil Liberties Union, Southern California Branch, Amicus Curiae.

LEO GALLAGHER,

GROVER JOHNSON,

Of Counsel.

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[7] "Legislative intervention (affecting freedom of speech) can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed." *DeJonge v. Oregon*, 299 U. S. 353.

Constitutional prohibition against legislative encroachment upon freedom must apply equally against judicial abridgment if we are to have a government of laws and not of judges.

[8] cf. *Reynolds v. United States*, 98 U. S. 163.